JOSEPH & KIRSCHENBAUM LLP
Attorneys at Law

Charles Joseph
D. Maimon Kirschenbaum
Denise A. Schulman
Josef Nussbaum
Laura Reznick

32 Broadway, Suite 601
New York, NY 10004
Phone (212) 688-5640
Fax (212) 688-2548
www.JK-LLP.com

February 21, 2017

VIA ECF

Hon. Edgardo Ramos
United States District Judge
United States District Court
Southern District of New York
United States Courthouse
40 Foley Square
New York, NY 10007

Re: Atanasoska v. 365 Seki, Inc.
Case No.: 16-cv-1217(ER)

Dear Judge Ramos:

We represent the Plaintiffs in the above-referenced action. I write to respectfully request that the Court approve the parties' settlement of this Fair Labor Standards/New York Labor Law action in accordance with *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015) and so-order their stipulation of dismissal. The parties' executed settlement agreement is submitted herewith as Exhibit 1, and the executed stipulation of dismissal (an unexecuted copy is Appendix A to the settlement agreement) is submitted as Exhibit 2.

Plaintiffs worked as servers at Sushi Seki restaurant located at 365 West 46th Street in Manhattan, which is owned and operated by Defendant 365 Seki, Inc. Plaintiffs' complaint alleged that Defendants jointly employed Plaintiffs and that Defendants (1) violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(m), and New York law, N.Y. Comp. Codes R. & Regs. tit. 12, §§ 146-1.3, 146-2.2, by paying Plaintiffs pursuant to a tip credit without giving them requisite notice; (2) violated the FLSA, 29 U.S.C. § 203(m) by paying Plaintiffs pursuant to a tip credit while requiring them to share tips with tip-ineligible managers; (3) violated N.Y. Lab. L. § 196-d by requiring Plaintiffs to share tips with tip-ineligible managers; (4) failed to provide Plaintiffs with the wage notices required under N.Y. Lab. L. § 195; and (5) violated the FLSA and New York Labor Law by retaliating against Plaintiffs for their complaints about the tip pool. While the wage claims were pled as collective and class claims pursuant to 29 U.S.C. § 216(b) and Fed. R. Civ. P. 23, respectively, the parties settled this action with respect to the Plaintiffs only before any certification motions were made.

On December 13, 2016, after engaging in significant discovery, including the depositions of both Plaintiffs, the parties attended a mediation with Mediator Laurence Silverman through the Southern District of New York's mediation program. At the mediation, the parties agreed to settle this case for $47,000.

The settlement is fair and reasonable and should be approved. Based on our calculations, the maximum damages Plaintiff Atanasoska could recover on her wage and notice claims are $13,389.82 ($1,674.91 for unpaid tip credit, $945 for misappropriated tips, $2,619.91 for liquidated damages on the unpaid tip credit and misappropriated tips, and $8,150 for wage notice violations), and the maximum damages Plaintiff Paulce could recover on his wage and notice claims are $12,180.90 ($1,270.45 for unpaid tip credit, $870 for misappropriated tips, $2,140.45 for liquidated damages on the unpaid tip credit and misappropriated tips, and $7,900 for wage notice violations).[1] Thus, the maximum potential damages for the wage and notice claims for both Plaintiffs are $25,570.72. This number is subject to potential reduction, however. For example, Defendants may be able to establish that there were certain weeks where Plaintiffs were paid more than the tip credit minimum wage, which would reduce their tip credit damages. In addition, the parties dispute whether the alleged ineligible tip pool participant in fact had sufficient managerial authority to render him ineligible to receive tips. *See, e.g.*, *Murphy v. Lajaunie*, No. 13 Civ. 6503, 2016 U.S. Dist. LEXIS 37137 (S.D.N.Y. Mar. 22, 2016) (finding issues of fact regarding alleged managers' eligibility to be included in the tip pool).

Plaintiffs also faced significant challenges in prevailing on their retaliation claims. The parties dispute whether Plaintiffs' complaints that managers received tips but were not assisting in serving customers constituted protected activity under the FLSA, 29 U.S.C. § 215, or New York Labor Law, N.Y. Lab. L. § 215. Even if Plaintiffs can establish that they engaged in protected activity, the parties dispute whether Defendants retaliated against Plaintiffs because of those complaints. Defendants contend that Plaintiff Paulce's employment was terminated because he got into a heated verbal altercation with a manager, not because of any complaints that he made. Similarly, Defendants contend that any reduction of Plaintiff Atanasoska's shifts was made for a legitimate business reason. They further contend that Plaintiff Atanaoska's employment ultimately ended because she chose to stop coming to work and that she was not constructively discharged. Even if Plaintiffs could establish liability on their retaliation claims, damages could be limited. Plaintiff Paulce's potential lost wages are relatively low because he found new employment within about two and a half months of his termination, and Plaintiff Atanasoska is not seeking lost wages for her retaliation claim. While N.Y. Lab. L. § 215 authorizes a court to award liquidated damages for retaliation claims, the amount is discretionary and is capped at $20,000.

Based on the foregoing, in light of the potential damages in this case, as well as the risks Plaintiffs face in proceeding with litigation, the settlement amount of $47,000 is fair and reasonable.

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[1] The settlement agreement provides that the full amount of Plaintiffs' maximum unpaid tip credit and misappropriated tips damages – $2,619.91 for Plaintiff Atanasoska and $2,140.45 for Plaintiff Paulce – will be reported as wages.

Moreover, the settlement was the result of arm's length negotiation after significant litigation. The settlement was reached with the assistance of an experienced mediator, which further weighs in favor of finding the settlement fair and reasonable. *E.g.*, *Capsolas v. Pasta Resources, Inc.*, No. 10 Civ. 5595, 2012 U.S. Dist. LEXIS 144651, at *14 (S.D.N.Y. Oct. 5, 2012). In addition, the settlement agreement does not contain any unfair non-monetary provisions. In accordance with extensive case law in this District, the settlement does not contain a confidentiality provision. *E.g.*, *Martinez v. Gulluoglu LLC*, No. 15 Civ. 2727 (PAE), 2016 U.S. Dist. LEXIS 5366, at *2-3 (S.D.N.Y. Jan. 5, 2016). As is appropriate in FLSA settlements, the mutual non-disparagement clause includes a carve-out that permits Plaintiffs to make truthful statements. *See*, *e.g.*, *Id.* at *3 ("Courts in this District have held that . . . if the [non-disparagement] provision 'would bar plaintiffs from making any negative statement about the defendants, it must include a carve-out for truthful statements about plaintiffs' experience litigating their case. Otherwise, such a provision contravenes the remedial purposes of the [FLSA] and . . . is not fair and reasonable.'"). The settlement agreement also includes a mutual general release, which many courts in this District have approved. *E.g.*, *Souza v. St. Marks Bistro*, No. 15 Civ. 6503, 2015 U.S. Dist. LEXIS 151144 (S.D.N.Y. Nov. 6, 2015); *Suarez v. Las Delicias Patisserie*, No. 14 Civ. 1152 (JCF), 2015 U.S. Dist. LEXIS 153768 (S.D.N.Y. Nov. 5, 2015). A general release is particularly appropriate in this case, as Plaintiffs asserted retaliation claims, thus broadening the scope of the complaint beyond mere wage and hour claims. In light of that, the "mutual release will ensure that both the employees and the employer are walking away from their relationship up to [this] point in time without the potential for any further disputes." *Souza*, 2015 U.S. Dist. LEXIS 151144, at *18.

Finally, the settlement provides for reasonable attorneys' fees and costs to Plaintiffs' counsel. Under the settlement agreement, Plaintiffs' counsel will receive $677.79 as reimbursement of costs[2] and one-third of the remainder of the settlement – or $15,440.67 – as attorneys' fees. The proposed fee award of one-third of the after-costs settlement amount should also be approved because it was consensual and agreed to by both Plaintiffs. Under the Named Plaintiffs' contingency fee engagement agreement, Plaintiffs' Counsel is entitled to request out of the total recovery one-third in attorneys' fees and recovery of costs. *See Mireku*, 2013 U.S. Dist. LEXIS 172102 (noting the consensual nature of the fee arrangement); *see also Rangel v. 639 Grand St. Meat & Produce Corp.*, No. 13 Civ. 3234, 2013 U.S. Dist. LEXIS 134207, at *4 (E.D.N.Y. Sept. 19, 2013) ("Pursuant to plaintiff's retainer agreement with counsel, the fee is one-third of the settlement amount, plus costs. This fee arrangement is routinely approved by courts in this Circuit."). Both Plaintiffs signed the settlement agreement, which provides for the one-third fee. Moreover, "[c]ontingency fees of one-third in FLSA cases are routinely approved in this Circuit." *Martinez v. Consulate Gen. of Algeria in N.Y.*, No. 16 Civ. 2390, 2016 U.S. Dist. LEXIS 157999, at *8-9 (S.D.N.Y. Nov. 15, 2016); *see also*, *e.g.*, *Maldonado v. Srour*, No. 13 Civ. 5856, 2016 U.S. Dist. LEXIS 139881, at *3 (E.D.N.Y. Oct. 6, 2016); *Garcia v. Atlantico Bakery Corp.*, No. 13 Civ. 1904, 2016 U.S. Dist. LEXIS 84631, at *3-4 (S.D.N.Y. June 29, 2016).

[2] Plaintiffs' counsel seeks reimbursement of the following costs: $400 filing fee; $288.11 for service of the complaint; and $49.68 for postage and delivery services.

To the extent that the Court deems a "lodestar" crosscheck appropriate, we have attached as Exhibit 3 a copy of Plaintiffs' counsel's contemporaneous time records. Based on those records, Plaintiffs' counsel's lodestar amount equals $23,147.50.[3] Therefore, the requested one-third fee amounts to 0.67% of Plaintiffs' counsel's lodestar. This amount is objectively reasonable, particularly in light of the good result and the consensual nature of the one-third agreement. *See, e.g.*, *Caprile v. Harabel Inc.*, No. 14 CV 6386, 2015 U.S. Dist. LEXIS 127332, at *6 (S.D.N.Y. Sept. 16, 2015) (approving one-third fee award that was less than plaintiff's counsel's lodestar).

For the foregoing reasons, counsel for both parties respectfully request that the Court approve the parties' settlement and so order the stipulation of dismissal. We thank the Court for its attention to this matter.

Respectfully submitted,

Denise A. Schulman

cc: All Counsel (via ECF)

[3] There are 5 billers identified in Plaintiffs' time records: myself ("DAS" in time records), D. Maimon Kirschenbaum ("DMK"), Ruchama Cohen ("RC"), Debora Torres ("DT"), and Bella Pliskin ("BP"). My billable rate as an associate has been approved in this district at $300 per hour, Mr. Kirschenbaum's billable rate has been approved at $450 per hour, and our firm's paralegals' billable rate has been approved at $125 per hour. *See e.g., Lizondro-Garcia v. Kefi LLC,* No. 12 Civ. 1906, 2015 U.S. Dist. LEXIS 85873, at *20 (S.D.N.Y. July 1, 2015).

D. Maimon Kirschenbaum graduated from Fordham University School of Law in 2005 and has worked as Joseph & Kirschenbaum LLP ("JK") since then. As a result of his accomplishments representing food service workers in New York City, he became a member/partner of the firm in May 2007. Mr. Kirschenbaum currently manages the firm, while also maintaining a docket comprised largely of individual and class/collective wage and hours lawsuit.

I graduated from New York University School of Law in 2008 and joined Joseph & Kirschenbaum LLP ("JK") in 2009. I was an associate at the firm until February 8, 2017, when I became a partner. The majority of my docket involves individual and class/collective wage and hour actions. As I performed almost all of my work on this case as an associate, we have applied an associate rate of $300 to my work.

Ruchama L. Cohen was a law clerk and then associate with our firm. She graduated from Benjamin N. Cardozo School of Law in 2015 and was admitted to the bar on or around January 21, 2016. Ms. Cohen worked on this case after her bar admission. As such, we applied a junior associate hourly rate of $250 to her work.

Bella Pliskin was a paralegal at JK from approximately 2003 to January 2017. She has taken classes towards a bachelor's degree at Brooklyn College. Debora Torres is a paralegal at JK. She received a B.S. in Criminal Justice from Rutgers University, Newark in October 2011. In January 2014, Ms. Torres completed a 10-month Paralegal Studies program at Fairleigh Dickinson University. Prior to joining JK as a paralegal in July 2014, Ms. Torres worked as a junior paralegal in the Employment Department of Ginarte, O'Dwyer, Gonzalez, Gallardo & Winograd LLP.